

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION**

***THIS DOCUMENT RELATES TO ALL
CASES***

MDL No. 2804

Case No. 17-md-2804

Hon. Dan Aaron Polster

**CERTAIN DEFENDANTS' POSITION STATEMENT REGARDING
SELECTIVE REMAND TO TRANSFEROR COURTS**

The Court has set for November 6, 2019, a case management conference regarding “next steps” in this MDL following the settlement of the Track 1 trial by the non-severed defendants.¹ In advance of that conference, the Court (through Special Master Cohen) advised the parties to meet and confer to attempt to reach agreement on several open items, including a plan for selective remand of cases out of the MDL and for other pending motions to dismiss.

For the past six months, our understanding of what the Court expected, based upon extended and repeated discussions with court-appointed Special Master McGovern, was for the parties to identify a small number of cases that would immediately be remanded to the transferor courts for all purposes, including case-specific discovery, motions and trial. On October 31, 2019, certain defendants submitted such a proposal to Plaintiffs and Special Master McGovern. Plaintiffs did not meet and confer with defendants about defendants’ proposal, and instead submitted to the Special Masters and the Court a proposal that is fundamentally inconsistent with

¹ The severed and non-settling defendants will submit their own proposal regarding Track 1-B.

immediate remand of any cases to the transferor courts for all purposes.

In light of the foregoing, certain defendants (“Defendants”)² hereby submit their proposed plan for selective remand, consistent with their proposal to Plaintiffs. Unlike Plaintiffs’ proposal, Defendants’ proposal is consistent with the parties’ and Special Master McGovern’s understanding that cases would be remanded for all purposes, including discovery and pre-trial rulings, in order to facilitate the efficient resolution of additional bellwether claims.

Defendants respectfully submit that the Court should adopt Defendants’ proposal for the reasons explained below. If the Court elects to give serious consideration to Plaintiffs’ proposal, notwithstanding its noncompliance with the directions provided by the Special Master, Defendants reserve their rights to withdraw this proposal, present a different proposal, and/or object to any Suggestion of Remand submitted by the Court to the JPML.³

DEFENDANTS’ PROPOSAL

I. Cases Selected for Remand

A. The Court would immediately file a Suggestion of Remand to the JPML to

² Defendants Allergan plc (appearing specially), Allergan Finance, LLC (f/k/a/ Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc.), Allergan Sales, LLC, and Allergan USA, Inc., Endo Pharmaceuticals Inc., Endo Health Solutions Inc., Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc., Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., Mallinckrodt LLC and SpecGx LLC, Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc. f/k/a Watson Pharma, Inc., Warner Chilcott Company, LLC, Actavis South Atlantic LLC, Actavis Elizabeth LLC, Actavis Mid Atlantic LLC, Actavis Totowa LLC, Actavis Kadian LLC, Actavis Laboratories UT, Inc. f/k/a Watson Laboratories, Inc.-Salt Lake City, and Actavis Laboratories FL, Inc., f/k/a Watson Laboratories, Inc.-Florida, Noramco, Inc., AmerisourceBergen Drug Corporation and AmerisourceBergen Corporation, Cardinal Health, Inc., McKesson Corporation, Anda, Inc., Henry Schein, Inc., Kroger Co., Kroger Limited Partnership I, Kroger Limited Partnership II, H. D. Smith, LLC, H. D. Smith Holdings, LLC (appearing specially), and H. D. Smith Holding Company (appearing specially). Specially appearing defendant Allergan plc, an Irish holding company, expressly reserves all defenses, including related to service and personal jurisdiction.

³ Defendants object to this process and expressly reserve all rights and objections regarding the process and case selection. Defendants have participated in this process and make this proposal only at the Court’s urging but with full reservation of all rights and objections.

transfer back to its original transferor Court for further proceedings and trial the following case:

1. *City of Chicago, Illinois v. Purdue Pharma L.P.*, Case No. 17-OP-45169 (N.D. Ohio) (“*Chicago-I*”).

B. The Court also would immediately file a Suggestion of Remand to the JPML to transfer back to its original transferor Court for further proceedings and trial the following case:

1. *City of Chicago, Illinois v. Cardinal Health, Inc.*, No. 18-OP-45281 (N.D. Ohio) (“*Chicago-II*”).⁴

C. The Court would similarly immediately file a Suggestion of Remand to the JPML to transfer back to their original transferor Court for further proceedings and trial the following two cases, previously designated by this Court as “Track Two,”

1. *The Cabell County Commission, West Virginia v. AmerisourceBergen Drug Corp.*, Case No. 17-OP-45053 (N.D. Ohio) (“*Cabell County*”).
2. *City of Huntington, West Virginia v. AmerisourceBergen Drug Corp.*, Case No. 17-OP-45054 (N.D. Ohio) (“*City of Huntington*”).⁵

D. The Court will file a Suggestion of Remand to the JPML to transfer back to its original transferor Court for further proceedings and trial one Sovereign Indian Tribe case selected by the parties no later than November 29, 2019 under the following procedure:

1. The case must be a case that was originally filed in federal court. As a

⁴ *Chicago-I* names as defendants certain opioid manufacturers; *Chicago-II* names as defendants certain opioid distributors. Defendants consent to (a) reassignment of *Chicago-II* to the judge to whom *Chicago-I* was originally assigned, upon remand to the transferor court, and (b) coordination of *Chicago-I* and *Chicago-II* before that judge for pre-trial purposes/discovery but reserve all rights as to any trial.

⁵ Upon remand to the transferor court, Defendants will consent to coordination of *Cabell County* and *City of Huntington* for pre-trial purposes/discovery but reserve all rights as to the structure of any trial.

condition to selection and remand, the parties agree that plaintiff shall not file a motion to remand to state or tribal court.

2. By no later November 22, 2019, Defendants shall propose four (4) Sovereign Indian Tribe cases for potential remand pursuant to the criteria above.

3. By no later than November 29, 2019, Plaintiffs' Steering Committee shall inform the Court of one (1) Sovereign Indian Tribe Case selected from the list of four (4) such cases identified pursuant to this Order.

E. Pursuant to the above Suggestion of Remand process, this Court, and the assigned discovery Special Master, shall no longer have subject matter jurisdiction over these cases. All pretrial and trial proceedings will be overseen by the original transferor Court(s). Upon transfer of these remand cases back to their original transferor Court(s), those Courts will enter case management orders for future pretrial proceedings, and set trial dates in accordance with the Courts availability.

F. As a condition of remand to the transferor court(s), plaintiffs in the remand cases agree that any dismissal of a case or named defendant shall be with prejudice.

II. Other Cases

A. In light of the ongoing work in this MDL on settlement, the NAS class certification motion, the remanded cases above, and the extensive and ongoing state court proceedings, the Court will not remand any additional cases before June 2021. In the interim, the parties shall meet and confer over a selection methodology.

B. The Track 1B cases shall be subject to a separate order of the Court.

III. Pending Motions to Dismiss

A. The Court should dismiss, without prejudice, any pending motions to dismiss previously filed pursuant prior to CMOs. These cases may be considered for remand

selection, and any motions to dismiss shall be filed in the transferor court and only after any rulings on a motion to amend under FRCP 15.

DISCUSSION OF DEFENDANTS' PROPOSAL

For the reasons explained below, Defendants' proposed procedures for the selection and management of cases for selective remand is manageable, fair to the parties, and consistent with Special Master McGovern's prior instructions.

A. Number of Cases

Under Defendants' proposal, a total of five cases (or three "case families") will be remanded for discovery and trial. In addition, approximately 8-10 opioid cases are currently scheduled for trial in state courts in 2020. Accordingly, Defendants respectfully submit that it would be unduly burdensome, and ultimately counter-productive, to remand more than these three "case families" at this time.

Discovery in each of the three case families is likely to be extensive. While Plaintiffs took substantial discovery of certain defendants in connection with Track 1, substantial discovery of the plaintiffs will need to be completed in each case. No discovery whatsoever has yet occurred with respect to these plaintiffs' alleged injuries (and the causal connection between those injuries and defendants' alleged conduct). Simultaneously conducting discovery in three separate jurisdictions will impose substantial burdens on counsel for both plaintiffs and defendants. Increasing the number of cases even further is likely ultimately to delay trial because the parties may struggle to complete their discovery obligations in a timely manner, as already occurred in the case of the City of Cleveland.⁶

⁶ Plaintiffs' proposal to try the City of Cleveland's claims against certain defendants in the first quarter of 2020 is, for this reason, wildly unrealistic. Even if Cleveland had now completed its document

B. Immediate Remand

The Court instructed the parties to meet and confer regarding a plan for the selective remand of certain cases, in order to expedite the trial of additional bellwether cases by leveraging the resources of multiple courts. Defendants respectfully submit that this goal is best achieved by the immediate remand of the selected cases. If selective remand is in fact appropriate and necessary at this juncture, then the transferor courts should manage the cases post-remand, including making case-specific discovery and pretrial rulings.

There is little or no efficiency to be gained by having this Court supervise jurisdiction-specific discovery. In connection with the Track 1 cases, plaintiffs have already taken substantial discovery relating to defendants' policies and procures. The principal focus of the discovery that remains to be completed is jurisdiction-specific, and focuses on (i) each defendants' conduct in the relevant jurisdiction, and (ii) the harms alleged suffered by each plaintiff. These issues could likely be addressed more expeditiously if the resources of three separate courts are brought to bear. And local courts may be better positioned to decide issues that turn, in substantial part, on factors such as regional geography and the local government entities that will be the focus of discovery.

Moreover, a federal court located within the state to which a case is remanded is likely to have greater familiarity with that state's statutory and common law. For this reason, too, efficiency considerations counsel in favor of an immediate remand, to allow local courts to decide dispositive motions.

production, which defendants do not concede, many fact depositions will need to be reopened. In addition, no expert discovery has taken place in that case a process that would alone take many months to complete.

C. Non-Severance of Parties

Defendants respectfully submit that any plan for the remand of selective claims should not involve the severance of any defendants or causes of actions. Of course, plaintiffs are entitled to dismiss defendants or claims from any cases with prejudice; but absent dismissal Defendants believe that cases should be remanded back to the transferor court in the entirety, so that the transferor court can manage its own docket based on the full case pending in its jurisdiction. Any severance decisions should be made by the transferor trial court, likely no earlier than after the completion of fact and expert discovery so that the particular circumstances of the case can be taken into account.

The selective severance of only certain defendants for remand is inefficient and jeopardizes the severed defendants' due process rights. This Court has made clear that the duplication of discovery should be kept to a minimum. *See, e.g.*, CMO 1. Selectively severing only a subset of defendants, however, would inevitably lead to massive duplication and inefficiency. If, for example, plaintiffs were to proceed against only the distributor defendants in the West Virginia cases, then myriad city and county officials would almost certainly need to be deposed twice: once in connection with the claims against distributors, and a second time in connection with claims against the manufacturer and/or pharmacy defendants.

In addition, the law of many states does not allow defendants to assert claims for contribution or indemnity at trial against absent parties. Accordingly, remanding claims against only a subset of defendants may jeopardize the due process rights of those defendants to seek contribution from co-defendants.⁷

⁷ Defendants also oppose the Letter to Judge Polster, Dkt. 2899, filed on the public docket contrary to the Court's instruction—from counsel for West Boca Medical Center, which (without the support of the PEC) proposes remanding only part of one case and would combine a hospital case and a Tribe case.

D. City of Chicago

Although the parties agree on little, they appear to agree that the *Chicago I* case should be remanded. Defendants respectfully submit that, in the interests of efficiency, the proposed remand should encompass the City's claims against both distributors and manufacturers.

E. Cleveland and Akron

The City of Cleveland was unable to keep pace with discovery, and its systematic failures required the Court to remove Cleveland from Track 1. Due in part to Cleveland's discovery failures, this Court previously ordered that the trial of Akron's and Cleveland's claims "shall not occur before the trial of the claims of the Track Two Bellwethers (as defined in docket no. 1218)." Dkt. No. 1392. In order to ensure compliance with the Court's order, Defendants' proposal does not contemplate a trial of Cleveland's or Akron's claims in the near term.

Defendants opposes severance of any subset of claims or defendants, but the West Boca Medical Center and Seminole proposal would create even more duplication and inefficiency by including only certain defendants from within a defendant group. Moreover, this proposal is directly contrary to the guidance of the court that no third party payor or hospital cases be part of the selective remand proposal.

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